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| **BOARD OF APPEALS CASE NO. 5339** | * | **BEFORE THE** |
| **APPLICANT: Thomas & Coni Murphy** | * | **ZONING HEARING EXAMINER** |
| **REQUEST: Variance to permit an accessory structure within the forest retention area; 1003 Goosecross Court, Bel Air** | * | **OF HARFORD COUNTY** |
| | * | **Hearing Advertised** |
| **HEARING DATE: October 15, 2003** | * | **Aegis: 4/11/03 & 4/16/03** |
| | * | **Record: 4/11/03 & 4/18/03** |

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# ZONING HEARING EXAMINER'S DECISION

**The Applicants, Thomas Murphy and Coni Murphy, are requesting a variance, pursuant to Sections 267-30.14 and 267-26C(6) of the Harford County Code, to permit an accessory structure within the recorded Forest Retention Area in an R1/Urban Residential District.**

**The subject parcel is located at 1003 Goosecross Court, Bel Air, Maryland 21014, in the Third Election District, and is more particularly identified on Tax Map 41, Grid 2C, Parcel 663, Lot 87. The parcel contains approximately 0.318 acres more or less.**

**The Applicant, Thomas Murphy, appeared and testified that he, and the Co-Applicant, Coni Murphy, are the owners of the subject property. He stated that the parcel is .318 acres in size, and is located within the Vineyard Oaks subdivision. The Applicants are the original owners and have resided on the property with their children for over five years. Mr. Murphy testified that he and his wife would like to construct a pool in their backyard in order to keep their three children close to home, so they could keep a closer watch over them. His wife and children want a pool and the proposed pool would also provide a therapeutic, low-impact exercise area, which would assist in relieving his symptoms of lower back pain.**

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**According to Mr. Murphy, the Applicants propose to build an oval shaped, free form in-ground pool approximately 20 feet by 42 feet in diameter. The pool would be surrounded by a 3-foot wide concrete walkway and a black wrought iron fence. The witness testified that he and his wife had chosen to locate the proposed pool in the back left-hand quadrant of his lot, where it would have the least possible impact on the Forest Retention Area which arcs across his backyard. The entire pool would be located within the Forest Retention Area, which is depicted on the site plan introduced as Exhibit A to Applicants' Exhibit 1.**

**Mr. Murphy testified that his Homeowner's Association must pre-approve any pools constructed within the Vineyard Oaks subdivision. He introduced a May 20, 2003 letter (Applicant's Exhibit 2) from MRA Property Management, Inc., stating that the Association's Board of Directors had approved his plans to construct the requested in-ground pool. Approval is subject to "[r]eceipt of any/all Harford County permits and approvals, and "[c]ompliance with all County and Covenants easements, restrictions, setbacks, rights of ways, etc." The witness further testified that his Homeowner's Association requires all pools to be constructed in the rear yard, and no pools are allowed in either front or side yards.**

**Mr. Murphy indicated that his lot has a 20-foot utility easement, which runs along the entire left property line, and extends 10 feet into his side yard. His home was built 2 feet behind the minimum front setback line, so as not to encroach into the aforesaid utility easement. This places the house in alignment with other homes on the court, but reduces the size of the rear yard.**

**The witness further testified that there is only one tree located within the Forest Retention Area where he proposes to construct his pool. That tree, which is of an unknown variety, is dead. The witness stated that neither he, nor his wife, nor anyone acting under their authority, has removed any trees from that Forest Retention Area. He also indicated that there is no existing undergrowth, other than grass, which would have to be removed in order to build the requested pool.**

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**The witness described the ground conditions in the subject area as wet, indicating that his property has moisture problems even in the heat of summer. He further indicated that the entire back yard is constantly wet, possibly because of the presence of an underground spring.**

**Mr. Murphy then testified that his lot is unique because it consists of rolling hills, which slope downward from front to back, level out in the rear yard, and then drop downward approximately 15 feet to the rear property line. In addition, the Forest Retention Area arcs across his backyard, extending further toward the house on the sides than in the middle.**

**The witness introduced a brochure from Nimmo pools (Applicants' Exhibit 3) and stated that the pool which he desires to construct is similar in appearance to one (marked with an "X") pictured on the middle right cover of that brochure. The wrought iron fence around the pool will be similar to fences (marked with "XX"s) surrounding pools shown on the top left and bottom right-hand corners of that same page.**

**Mr. Murphy stated that the trees on their lot are cherished by his family, and that they have planted two trees within their Forest Retention Area. He also stated that the adjoining rear property owners had planted a number of trees in their Forest Retention Area for privacy purposes. Mr. Murphy also stated that he and his wife had spoken with all adjoining property owners, as well as most of the property owners on their Goosecross Court, and that all but one of those neighbors had expressed support for the subject application. The strongest objection was voiced by the neighbor whose property (Lot 86) adjoins their parcel to the right. He also indicated that they had spoken with the owner of Lot 95, which adjoins their rear property line, and that that individual's primary concern was privacy. He and his wife, therefore, decided to plant mature trees between the two lots to insure that the pool was screened from view.**

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**Mr. Murphy stated that he is aware of several other pools built within hisneighborhood, including one about 500 yards from his home in an adjacent court. The owners of that property obtained a variance to construct a pool within the Forest Retention Area. A number of large trees were removed during construction of that pool. Only one dead tree will need to be removed in order to construct the proposed pool. Nevertheless, he and his wife intend to do considerable mitigative planting, both around the pool and within other portions of their Forest Retention Area. They have hired Frederick Ward and Associates to assist with the development of a plan to minimize any potential impact to the Forest Retention Area.**

**The witness stated that in his opinion, the proposed pool will have no adverse impact on adjacent properties because there are numerous other pools in the neighborhood, and because he plans on installing a first class pool. In addition, the proposed mitigative planting will enhance the Forest Retention Area, by providing a significant number of additional trees. He also stated that literal enforcement of the Code would cause both practical difficulty, and unreasonable hardship to his family. If the requested variance is not granted they will be unable to construct a pool on their property, in a neighborhood where other homeowners have installed pools, and there is nowhere on his property where a pool could be built outside the Forest Retention Area. The right rear portion of his backyard is also encumbered by Forest Retention Area, and contains a significant number of large trees. Constructing a pool in that area would result in greater detriment to the Forest Retention Area.**

**On cross-examination, Mr. Murphy testified that he was aware of only one other homeowner, besides the one in Case No. 5231, who had obtained a variance to construct a pool in his rear yard. He did not know, however, whether that particular variance involved the the Forest Retention Area. Mr. Murphy also verified on cross-examination that his home is a "South Hill" which was the largest model offered by the builder, and that it has an attached rear deck which reduces the size of his backyard.**

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**In response to questions asked by the Hearing Examiner, the Applicant acknowledged that he and his wife had not considered the possibility of building a smaller pool. He also stated that there is no place in his rear yard where the requested pool could be constructed without encroaching into the Forest Retention Area, and that his Homeowners Association does not allow pools in front or side yards.**

**Mr. Alvin Schneider, a duly qualified expert in the field of environmental planning with a concentration in forestry and forest conservation planning, testified in support of the application. Mr. Schneider, who has been employed by Frederick Ward & Associates for 15 years, indicated that he had reviewed the application and Staff Report, along with various series of Harford County forest conservation plans, and ariel photographs of the subject neighborhood. He indicated that he was familiar with, and had personally visited both the subject property, and the surrounding neighborhood. He is also familiar with Harford County's requirements for Forest Retention Areas, and stated that in order to be considered a forest, a wooded area needs to be 35 feet wide at its narrowest point, and 10,000 square feet in total size. He further testified that he had reviewed both the Vineyard Oaks Subdivision and the Forest Retention Area designated within that subdivision. The Forest Retention Area located within that neighborhood will not constitute an actual forest unless it is replanted.**

**Mr. Schneider then discussed the impact of the designated Forest Retention Area on Applicants property. He indicated that the Murphy lot is 13,852 square feet in size, and that 3,440 square feet, or 25% of the lot's total size, is located within the Forest Retention Area. He further testified 50% of Applicants' rear yard is encumbered by this Forest Retention Area, which acres across the rear portion of their property, and that the Applicants' property is also one of the smaller lots in the Vineyard Oaks subdivision.**

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**The witness described the subject property as loosely pie shaped, due to its location on a cul-de-sac. He also indicated that because the lot is pie shaped, the home had to be built behind the front setback line, so as not to infringe into the utility easement which runs along the western property line. That easement is a total of 20 feet wide, with 10 feet located on the Applicants' property, and 10 feet located on the adjoining lot. Placement of Applicants' home two feet behind the minimum front setback line diminishes the size of their backyard.**

**Mr. Schneider further testified, based on his review of the original forest conservation plan, that the thick forest originally found between Applicants' property, and adjoining lot 88, was cleared when the utility easement was installed. In addition, the Forest Retention Area in the subject area is now basically empty, and contains only one dying beech tree. The Forest Retention Area in the eastern rear portion of their lot remains intact. The Forest Retention Area which is supposed to be located between the subject parcel and the adjoining rear lot (No. 95) no longer exists.**

**The witness identified three photographs (Applicant's 7A, B, and C), which he stated accurately reflect the current condition of the property. Applicants' Exhibit 7A is taken from Goosecross Court, looking down the utility easement along the western property line toward the left rear portion of the Forest Retention Area. As shown in that photograph, there are no trees on the Murphy's property within the utility easement. Applicants' Exhibit 7B depicts the Forest Retention Area at the opposite side of the property, and the existing patio and deck of the subject property. Applicant's Exhibit 7C shows the one partially dead tree which would have to be removed in order to construct the requested pool. The witness indicated that in his opinion, removal of one partially dead tree and an area of grass would not result in any material disturbance to the Forest Retention Area.**

**Mr. Schneider suggested that in order to mitigate any disturbance to the aforementioned Forest Retention Area, the square footage of the existing Forest Retention Area could be calculated to determine how many trees could fit in that area. The Applicants can then be required to plant an equal number of trees elsewhere on the property.**

In the alternative, they could pay a fee in lieu thereof to the County Conservation Fund. Any plantings installed should be native to the area. He opined that it would require approximately 6-7 one to two inch caliber trees to fill the denuded Forest Retention Area.

The witness further testified that the requested variance would have no adverse impact on water quality, because the mitigating plantings would actually improve water quality. He also indicated that Forest Retention Areas are generally established to protect something. Because there are no streams on the subject property, and the only existing vegetation is grass, there is nothing actually located within the subject Forest Retention Area to protect.

Mr. Schneider then summarized the unique elements of Applicants' property. He testified that the property is unique because of its loose pie shaped configuration which results from its location on a cul-de-sac, the Forest Retention Area which arcs across its backyard, and the sewer line easement which runs along its western property line. He also stated that denial of the requested variance would cause practical difficulty for the Applicants, by prohibiting them from building a pool in their back yard.

Mr. Schneider further indicated that from an environmental planning standpoint, the requested variance would cause no detriment to adjoining properties. He indicated that in his opinion, the proposed pool would be screened from view by Lots 86 and 88 by trees located within the existing Forest Retention Areas. He could not say, however, conclusively determining for sure whether the proposed pool would be visible from Lot 95, due to the lack of trees in the Forest Retention Area located on that parcel.

Mr. Schneider testified that during his review of the Vineyard Oaks Subdivision, he had found one pool constructed within the Forest Retention Area. The Department of Planning and Zoning supported the homeowner's request for a variance in that Case (No. 5321). The Zoning Hearing Examiner's decision in the aforesaid case was introduced as Applicant's Exhibit 9. Finally, Mr. Schneider testified that he is familiar with the “Limitations, Guide and Standards” set forth in the Harford County Zoning Code, and that, in his opinion, the granting of the requested variance would not have any detrimental environmental impacts on either adjoining properties, or the Forest Retention Area.

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**In response to questions on cross examination, the witness acknowledged that Lots 88, 87, 86, 85 and 84 all have arc shaped Forest Retention Area boundaries. He further indicated that it is not unusual for lots located on cul-de-sacs to have arc shaped Forest Retention Areas. He agreed that there are other lots on Goosecross Court with loose pie shape configurations, and stated that there are three other lots on the street (Nos. 81, 82 and 83) which are smaller than the subject parcel. The witness acknowledged that he had not calculated either the amount of impervious surface area currently existing on the subject property, or that which would be created by construction of the proposed pool. The witness further testified that there is nothing related either to the soil, or soil makeup in the subject Forest Retention Area which would prevent trees from growing in that area.**

**Mr. Schneider noted that although there is supposed to be Forest Retention Area on Lot 95, which adjoins Applicants' rear property line, the existing tree is insufficient coverage to screen the proposed pool from view in that area. He stated that because Lot 95 is located downhill from the subject property, visibility is not really an issue. The witness also indicated that because the exact location of the proposed pool was not marked when he visited the site, he could not tell whether the small trees located along the boundary line between Applicants' property and Lot 95 would have to be removed. He stated that any trees removed from that area would be transplanted, and that no trees not actually located on Applicants' property would be touched. Finally, the witness acknowledged that there is only one home on Goosecross Court with a pool. That pool, which is located on Lot 81, was constructed in close proximity to the home, and does not encroach into the Forest Retention Area.**

**The Co-Applicant, Coni Murphy, appeared and testified that there is only tree which would need to be removed in order to construct the proposed pool. She stated that the small trees referred to by Mr. Schneider are actually located on Lot 95 and would not be touched. She also indicated that neither she nor her husband have removed any trees from their Forest Retention Area since moving into their home five years ago.**

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**Mrs. Murphy testified that she knows the people who constructed a pool on Lot 81, and that she is familiar with that property. That home does not have a walk out basement, and therefore does not need a deck to provide access to the rear yard from the family room. In contrast, the rear of her home is located 14 feet above ground level. In addition, Lot 81 does not slope downward from front to rear.**

**The witness agreed that there is no other location, either inside or outside of the Forest Retention Area where a pool can be constructed in their rear yard. She also indicated that the proposed location was selected because it have the lease impact on the Forest Retention Area. She also affirmed her husband's testimony that if the requested variance is granted they will both landscape around the completed pool, and plant additional trees in the Forest Retention Area on the other side of their rear yard. She also testified that the Applicants intend to install privacy plantings along their side and rear property lines.**

**Mrs. Murphy described the proposed location as perpetually wet, and stated that water drains from the street toward her rear property line whenever it rains. She also indicated that any rain causes a line of water to run through the subject area of her rear yard.**

**Robert Nimmon, the final witness to testify in support of the subject application, stated that he had been contacted by Mr. and Mrs. Murphy with regard to installing a pool in their backyard. The witness described the proposed pool as a high quality, free form shaped pool, which would provide about 704 square feet of swim area. He further indicated that the pool would take about three weeks to construct. The witness indicated that his company makes every effort to use the least restricted access to the construction area. He did not recall discussing proposed landscaping with the Applicants, but stated that his company would not be doing any landscaping at the site.**

**In response to questions asked on cross examination, Mr. Nimmo indicated that his company installs pools of all sizes, and indicated that it could build a pool smaller than 704 square feet in diameter if someone wanted one. He further stated that the concrete apron around the pool would be approximately 3 feet wide, and would create approximately 500 square feet of impervious surface. According to the witness, 704 square feet of actual swim area would not be impervious, but would instead function as a reservoir.**

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**Mr. Anthony McClune, Chief of the Current Planning Division, for the Department of Planning and Zoning, appeared and testified regarding the findings of fact and recommendations made by that agency. The Department recommended denial of the application in its May 12, 2003 Staff Report. Mr.McClune indicated the Department found that the subject property is not unique, and that it is a standard cul-de-sac lot, typical of other lots found in the neighborhood. He also stated that there are several smaller lots on Goosecross Court, and that the Applicants' property meets all Code requirements, and is typical for both the general area and the Vineyard Oaks Subdivision.**

**Mr. McClune testified that although the Applicants were able to construct a large house and fairly large deck on their property, the lot is simply not large enough to accommodate a pool unless the requested variance is granted. He noted that the Applicants are proposing to build a fairly large pool, and stated that the Department found that they had not met their burden of requesting the minimum necessary relief. In support of this assertion, Mr. McClune pointed out that the Applicants produced no testimony to indicate that a smaller pool, requiring a smaller variance, could not be located elsewhere on their property. The above finding was not set forth in the Staff Report.**

**Mr. McClune stated that the drainage easements surrounding the subject property are standard, and that, as verified by Staff Report Attachment 9, there are similar easements found on every other lot on the cul-de-sac, and throughout most of the development. He further pointed out that the house was built only two feet behind the setback line, and opined that this is not a factor in the Applicants' determination of where to locate the proposed pool. Mr. McClune also noted that the Vineyard Oaks subdivision, and other similar developments found within the county, are subject to forest conservation requirements set forth in the Harford County Code. He also stated that the Forest Retention Area affects a smaller portion of the subject parcel than several other lots within the development.**

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**According to Mr. McClune, granting the requested variance for this non-unique property, would adversely impact the intent of the Code to maintain forested areas throughout the County in order to provide improved water quality. He stated that while there is no stream on the subject site, the runoff from that site eventually works its way into the County water supply, and then into the Bay. Forest Retention areas are designed to soak up runoff, thereby improving water quality. He also expressed concern that granting the requested variance in this case, would set a precedent for future disturbances to the Forest Retention Area by other property owners seeking to establish multiple accessory uses on encumbered lots.**

**Mr. McClune noted that because the developer chose to configure properties within the Vineyard Oaks Subdivision as forest retention lots, some of the lots in the community are simply not large enough to accommodate numerous accessory uses. The forest retention areas were clearly designated on the site plan when the Applicants purchased their property, and decided what size home they wished to construct thereon. He pointed out that the Applicants chose to build a large rear deck, when a smaller deck would have been sufficient to provide ingress and egress to their rear yard. He also noted that the 16 foot by 30 foot deck constructed by the Applicants takes up most of the area available in their rear yard for installation of accessory uses.**

**Mr. McClune further testified that the subject area was recorded as Forest Retention Area, and stated that site inspections conducted during development revealed that it was clearly designated as area which was to be retained. He declined to speculate as to who removed the trees from the Forest Retention Area. He did however, state that regardless of who removed the trees, the existing condition violates Code provisions, and the area needs to be replanted. If the requested variance is denied, the County will require the Applicants to reforest the subject portion of their Forest Retention Area.**

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When asked by the Hearing Examiner to address Ms. Fleur Van de Wall's concerns regarding potential runoff onto her property,[1] Mr. McClune stated that pools are impervious surfaces, and that rainwater falling either onto the decking, or the pool itself, is unable to filtrate back into the soil for reabsorption by vegetation. He did note that the pool would trap some water runoff during the summer but noted that pools are usually closed up and covered during the winter months. When covered, the pool would become impervious, and create an unspecified amount of additional runoff.

Mr. McClune next addressed Applicants' allegations regarding the drainage and utility easement located between the rear of their property and Lot 95, stating that it is designed to create a natural runoff area. He also noted that most of the lots at the end of the cul-de-sac on Goosecross Court have walkout basements due to the natural grade found in that area of the development.

In response to questions asked on cross-examination, Mr. McClune indicated that in determining that the subject property was not unique, the Department had considered not only other lots in the Vineyard Oaks Subdivision, but also those found in neighboring developments. He acknowledged that the subject property is on the small side, and that it is irregularly shaped, but stated that this is a typical shape for lots located at the end of a cul-de-sac. He also stated that all cul-de-sac within Harford County have curved front property lines.

Mr. McClune did admit that the determination as to whether or not a specific property is unique requires comparison to all other lots in the area, and not just other cul-de-sac lots. He also stated that location on a cul-de-sac could actually be considered a unique characteristic. In addition, he indicated that while the subject property is one of the smallest lots found within the neighborhood, it is not the smallest lot. He also testified that the subject property meets all minimum lot size requirements applicable to the district.

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[1] Ms. Van de Wall is a Protestant whose testimony was taken out of turn, to enable her to return home for child care reasons.

**The witness further acknowledged that although the Applicants' property does not contain as much total Forest Retention Area as some of the other lots in the neighborhood, it is also necessary to consider the total percentage of the property which is encumbered by Forest Retention Area. Despite his testimony on direct examination that all of the lots in this development had similar drainage and utility easements, Mr. McClune was unable to identify any other lot in the neighborhood with a 20-foot utility easement along the side property line. He did acknowledge that the Applicants' home had to be set back 2 feet behind the front property line so that it would not encroach into that utility easement. Nevertheless, he noted that because the side yard setback is also 10 feet, the drainage easement did not add any additional constraints on the placement of the Applicants' home.**

**Mr. McClune testified that other than a visual inspection, no one from the Department of Planning and Zoning had done any testing to evaluate either the existing water quality, or the effects on water quality which would be caused by the requested variance. When questioned regarding Mr. Schneider's testimony that mitigative plantings would actually improve water quality, Mr. McClune indicated that no tests were needed to dispute that allegation. He stated that if the variance is not granted, the Department will require the Applicants to correct the existing Code violations by replanting the Forest Retention Area of their property. This would increase water quality more than the proposed mitigative plantings, because a larger area would then be replanted. The witness could not identify any specific cases where the Department had required a property owner to reforest the Forest Retention Area in the subject neighborhood. However, he did state that the Department has been very active regarding forest retention within this particular community. He also acknowledged that the developer had not been issued any citations in connection with the destruction of trees during construction.**

Mr. McClune was then cross-examined by the Applicants regarding the Board's decision in Case No. 5321. He indicated that he was familiar with the decision in that case, and that he had testified at that hearing. According to Mr. McClune, the Department found the property in that case to be unique, because the Applicant provided specific information documenting both a severe drainage problem, and that this drainage problem was actually killing trees located within the Forest Retention Area on that site. These findings were confirmed by the Department. The witness also indicated that there was specific testimony presented before the Hearing Examiner in that case to show that improper grading of that lot caused the existing drainage problems, and that this had resulted in the death of trees planted within the Forest Retention Area.

Mr. McClune further differentiated Case No. 5321 by stating that there were specific findings made by both the Department and the Hearing Examiner in that case that allowing the Applicant to re-grade the site, construct a pool, and plant mitigative vegetation, would provide an actual benefit to the Forest Retention Area by mitigating a problem which threatened potential harm to adjacent trees. The witness stated that there had been no testimony introduced in the present case to prove that an existing drainage problem had either killed trees within the Forest Retention Area, or would kill any new trees planted at that location. He pointed to Ms. Van de Wall's testimony that she had actually planted trees in her Forest Retention Area, and that those trees were still living. Mr. McClune further noted that the Applicants themselves had expressed an intent to plant trees in that area.

Finally, although Mr. McClune acknowledged that there was only one dying tree in the subject Forest Retention Area, he noted that the Applicants themselves had not introduced any testimony to indicate either how the previously existing trees were removed, or why the one remaining tree is dying.

In response to cross-examination by People's Counsel, Mr. McClune indicated that the testimony in Case No. 5231 had clearly proved that the lot did "not have positive drainage, that basically the middle of the yard was actually lower than the perimeter of the yard, and when the water fell on the property, it actually flowed in towards the middle of the lot and gathered and pooled rather than flowing front to back or flowing from side to side."

Finally, Mr. McClune questioned whether the Applicants had requested more than the minimum infringement necessary to obviate any hardship in this case. He noted that there was no evidence introduced to prove that it was not possible for the Applicants to construct a smaller pool in closer proximity to their home.

Ms. Mariska "Fleur" Van de Wall appeared and testified in opposition to the subject application. She lives on Lot 95, which adjoins Applicants' rear property line. Ms. Van de Wall stated that when she and her husband purchased their home four years ago, they loved the neighborhood because of all the trees, despite the fact that there were not many trees growing in the rear portion of their property. She was told that this lack of trees was due to the fact that the Applicants had built a large house, and that many trees were either damaged, or died during construction of their home.

The witness stated that since moving into their house, she and her husband have planted approximately $10,000 worth of trees in the deforested portion of their Forest Retention Area in an effort to return the site to its original wooded state. She disputed Mr. Schneider's testimony that there are no trees in the Forest Retention Area of her property, and introduced photographs (Protestant's Exhibits 3A and 3B) showing trees located therein. She indicated that Protestant's Exhibit 3A was taken from her backyard looking toward the rear of the Applicants' home, and Protestant's Exhibit 3B was taken from the Applicants' backyard looking toward her rear yard. Ms. Van de Wall described the view of her backyard from that vantage point as secluded by trees. She testified that she took the referenced photographs to show that there are standing puddles of water in the Forest Retention Area between her property and the Applicants' lot even in "the heat of July." She also indicated that there is a huge drainage problem in the neighborhood which has necessitated the installation of large drains in her backyard, as well as on some of the other properties located within the community.

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**Ms. Van de Wall indicated that she and her husband are concerned, that because their property is downhill from Applicants' lot, the installation of a pool in their yard will reduce soil absorption, thereby causing more water to run into their yard. She stated that several of her neighbors had flooding problems last summer due to the excessive rainfall, and that she would like a guarantee that the proposed pool will not cause drainage problems in her backyard. The witness expressed concern that if Applicants dig a large hole to install a pool in their yard, the root systems of the trees she has planted on her property will be damaged. She also questioned whether there would be enough space between the Applicants' pool, and her rear yard to enable them to plant additional trees in that area. Finally, Ms. Van de Wall indicated that the Applicants proposal to plant mitigating trees in the Forest Retention Area on the opposite side of their yard would do nothing to protect or buffer the forested portion of her yard.**

**On cross-examination, the witness acknowledged that she had no personal knowledge as to how, or if any trees had been removed from Applicants' yard. She reiterated that there are existing trees which obstruct her view of the Applicants' rear yard, but stated that she can still see their house because it sits high up on a hill. However, she did acknowledged that the proposed pool would be constructed at ground level. Ms. Van de Wall admitted that she had installed a swing set within her Forest Retention Area with the permission of her Homeowner's Association but without contacting the Department of Planning and Zoning or obtaining a variance.**

**Mr. Brian Chapman, whose property adjoins the subject parcel to the right (Lot 87) also testified in opposition to the subject application. He stated that the slope of Applicants' lot is fairly typical for the neighborhood, and is shared by all of other lots on the cul-de-sac from the boundary between Lots 88 and 87 to the boundary between Lots 85 and 84. He also indicated that each of the three parcels have walk-out basements. Mr. Chapman testified that he had resided on lot 86 for approximately six months when the Applicants moved into their home on Lot 87. Prior to purchasing their home, he and his wife looked at several other lots in the neighborhood, but decided to purchase Lot 86 because it was heavily wooded.**

**The witness further stated they had looked at Applicants' parcel (Lot 87), and asked the builder which models could be built on that lot. Mr. Chapman indicated that the South Hill has the largest footprint of any model offered by the builder of the Vineyard Oaks Subdivision. According to the witness, he was assured by the builder prior to purchasing his property that a South Hill could not be constructed on Lot 87 because the parcel was not large enough to accommodate a home of that size. He stated that there is also a South Hill on Lot 85 which adjoins the other side of his property, and that he and his wife had not wanted their home to be located between two larger South Hill models.**

**Mr. Chapman stated that when he observed the footers being poured for the Applicants' home he immediately contacted the builder, who advised him that they had found a way to make the south hill fit onto Lot 87. He stated that the builder had to shove the home as far back onto the Applicants' property as possible in order to make it fit onto the lot. He also opined that this fact can be readily verified by looking at the ariel photograph of the property introduced as Applicant's Exhibit 6.**

**Mr. Chapman also testified that he witnessed the builders bump into, pile dirt on, and kill, trees on the Applicants' property during construction of their home, and that seven to ten 100-foot tall trees were destroyed by the builder. The witness also testified that additional trees had to be removed between Applicants' property and the adjoining Lot 88, so that the builder could install a storm drain behind Lot Nos. 84 85, and 96. The builder removed quite a few trees from his backyard, and the Van de Wall's back yard in the process of constructing that drain. He further testified that he and his wife have spent in excess of $25,000 replanting trees in their Forest Retention Area, and over $15,000 regrading and installing drains and a patio to resolve drainage problems on their lot.**

**Mr. Chapman indicated that the Applicants are nice people, and good neighbors, but opined that they had created their own hardship by constructing a home which was obviously too large for their lot. Finally, the witness stated that there are several public pools within a one to two mile radius of Applicants' home.**

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**In response to questions asked on cross examination, Mr. Chapman indicated that the topography of Lots 85, 86 and 87 is almost identical. He stated that there are over 100 lots within the Vineyard Oaks Subdivision, and 12 or 13 lots on Goosecross Court. He further testified that his property is almost three-quarters of an acre in size, and is approximately twice the size of Applicants' lot.**

## CONCLUSION:

**The Applicants, Thomas Murphy and Coni Murphy, are requesting a variance pursuant to Sections 267-26C(6) and 267-30.14 of the Harford County Code, to permit an accessory structure within the recorded Forest Retention Area in an R1/Urban Residential District.**

**Section 267-26C(6) of the Harford County Code makes the following provisions with regard to accessory uses:**

**A. Generally. Except as otherwise restricted by this Part 1, customary accessory structures and uses shall be permitted in any district in connection with the principal permitted use within such district. Private roads and driveways shall be permitted in any district as an accessory use to any principal use when located in the same district as the principal use.**

**B. Zoning certificate required. Accessory uses specified in this section require the issuance of a zoning certificate. Any accessory use not specified in this section does not require a zoning certificate.**

**C. Use limitations. In addition to the other requirements of this Part 1, an accessory use shall not be permitted unless it strictly complies with the following:**

**(6) No accessory use or structure, except fences, shall be located within any recorded easement area.**

## Case No. 5339 - Thomas & Coni Murphy

**Section 267-30.14 of the Forest and Tree Conservation Article of the Harford County Code, permits the granting of variances from the provisions set forth therein, stating:**

**A. The Board of Appeals may grant a variance to this Article in accordance with this section and Section 267-11 of this chapter.**

**B. In granting a variance to this Article the Board shall issue specific written findings of fact demonstrating that the granting of the variance will not adversely affect water quality.**

**Section 267-11 permits the granting of variances stating:**

**A. [V]ariances from the provisions or requirements of this Part 1 may be granted if the Board finds that:**

**(1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.**

**(2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest."**

**B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.**

**C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.**

## Case No. 5339 - Thomas & Coni Murphy

**Section 267-30.14, of the Harford County Code, which governs the granting of variances within Forest Retention Areas, requires the Board to make specific written findings of fact demonstrating that a proposed use will not adversely affect water quality.**

**The above requirement is imposed in addition to those set forth in Section 267-11 pertaining to variances in general. The threshold question in this case is therefore, whether the Applicants have met their burden of proving that the proposed use would not adversely affect water quality.**

**The evidence presented in this case indicated that the subject portion of the Forest Retention Area is virtually empty, and contains only one partially dead beech tree and an area of grass. All of the large trees previously found in that area were killed by the builder during construction of either the Applicants home, or a drainage and utility easement designed to alleviate severe drainage problems in the area of the subject property. The Applicants testified that if the requested variance is granted, they intend to do considerable mitigative planting immediately upon completion of the pool. The Applicants have hired Frederick Ward and Associates to assist them with developing a plan to minimize potential impact to the Forest Retention Area.**

**Mr. Schneider, an expert in the field of environmental planning, testified that Forest Retention Areas are generally designed to protect something, and pointed out that in this case there is nothing to protect. He further indicated that the mitigative plantings proposed by the Applicants would improve water quality by increasing vegetation in the subject area. He also testified that there is nothing about either the soil, or the soil makeup, which would prevent trees from growing in the subject location. In fact, Ms. Van de Wall planted numerous trees in her portion of the adjoining Forest Retention Area, and those trees are alive and well despite the perpetually wet conditions.**

**Mr. McClune testified on behalf of the Department of Planning and Zoning that if the requested variance is not granted, the Department will require the Applicants to reforest the denuded portion of their Forest Retention Area. Mr. Schneider and Mr. McClune agree that planting additional trees on the subject property will improve water quality. The Department has not required any other property owner in Vineyard Oaks to reforest areas damaged by the builder during construction. However, the Hearing Examiner accepts Mr. McClune's testimony that this failure is due to a lack of knowledge regarding specific zoning violations within that community.**

**Mr. McClune testified that requiring the Applicants to revegetate their Forest Retention Area would result in the planting of more trees, than the mitigative plantings proposed by the Applicants. However, he also stated that the Department had neither received nor reviewed a specific mitigation plan from the Applicants in this case. Mr. Schneider, on the other hand presented credible testimony to show that any disturbance caused by the installation of the requested pool could be effectively mitigated. This mitigation could be accomplished by calculating the square footage of the existing Forest Retention Area to determine how many trees could fit in that area. The Applicants could then be required to plant an equal number of trees elsewhere on the property. He testified that it would require approximately 6 or 7, one to two inch trees, to replace those presently missing from the Forest Retention Area. There was no evidence introduced to indicate that the Applicants would be unable to plant this number of trees elsewhere on their property. The Hearing Examiner, therefore, finds that the Applicants have met their burden of proving that the requested variance would not adversely affect water quality.**

**With the threshold issue resolved, it next becomes necessary to address the requirements set forth in Harford County Code Section 267-11. The Maryland Court of Special Appeals set forth a two prong test for determining whether a variance should be granted in the case of Cromwell v. Ward, 102 Md. App. 691, (1995). This test can be summarized as follows: First, there must be a determination as to whether there is anything unique about the property for which the variance is being requested. A lot is unique only if there is a finding that a peculiar characteristic or unusual circumstance, relating only to the subject property, causes the zoning ordinance to impact more severely on that property than on surrounding properties. Cromwell, supra, at 721. If the subject property is unique, the trier of fact may proceed to the second prong of the test. The second prong involves a determination as to whether literal enforcement of the zoning ordinance with regard to the unique property would result in practical difficulty or unreasonable hardship to the property owner.**

**As stated by the Court of Special Appeals in North v. St. Mary's County, 99 Md. App. 502, 638 A.2d 1175 (1994),**

> **"The 'unique' aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. 'Uniqueness' of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls." *Id., at 99 Md. App, 514.***

**The Hearing Examiner finds that the subject property is unique. The subject parcel is one of the smaller, although not the smallest lot in the Vineyard Oaks Subdivision. There are three smaller lots on Goosecross Court, but as shown on the Applicant's Exhibit 6 and Protestant's Exhibit 2 (which is also Staff Report Attachment 9), none of these properties have a significantly curved front property line, such as that found on the subject parcel.**

The property is also irregularly shaped due to its location at the end of a cul-de-sac. There was undisputed testimony that this factor necessitated the placement of Applicants' home two feet behind the front setback line, thereby reducing the size of the rear yard. The Protestants, and the Department of Planning and Zoning, allege that this fact does not does not make the property unique because there are other pie-shaped lots on Goosecross Court. However, despite the fact that Mr. McClune described the subject property as a typical cul-de-sac lot, he also testified that location on a cul-de-sac can make a parcel unique. He further indicated that cul-de-sac lot must be compared to all other lots in the area, not just other cul-de-sac lots, in determining whether or not they are unique.

The subject parcel is located within a forested neighborhood. A significant portion of the property is encumbered by Forest Retention Area. Twenty-five percent (25%)of the entire parcel, and fifty percent (50%) of the rear yard are located within the Forest Retention Area. That area, which arcs across Applicants' rear yard, extends closer to the dwelling on the sides than in the center. The arc of the Forest Retention Area follows the front curvature of the lot, which, as previously stated, is caused by its location on a cul-de-sac. Although there are four other lots on Goosecross Court with arc-shaped Forest Retention Areas, all of those lots are larger, and three are considerably larger, than the subject property.

The topography of the lot also slopes downward from front to back. The sliding glass doors on the rear of the dwelling are located 14 feet above ground level. The Applicants offered unrebutted testimony that this elevation necessitated the construction of a rear deck to provide ingress and egress from the upper levels of their home, for safety purposes. There is also a utility easement, located along the western property line, which is larger than that found on any other parcel within the development. However, the Hearing Examiner notes that this easement does not impact the subject parcel's buildable area, due to the fact that it mirrors the 10-foot building setback.

**In addition, there was undisputed testimony introduced to prove that the subject portion of Applicants' rear yard is constantly wet, and that a gully runs through that area whenever it rains. This testimony was verified by Ms. Van de Wall, who stated that there is standing water in the Forest Retention Area between her property and the subject parcel. Photographs were also introduced to depict the standing water in that area, which the witness indicated is present even in "the heat of July".**

**Furthermore, because the lot naturally slopes from front to back, rainwater runs downhill, from the front of the Applicants' property toward their rear yard. Mr. McClune indicated that the subject area was established to function as a drainage easement, to enable water to collect there, and then flow out of the area. He also testified that the subject property is indistinguishable from any other lot with sheet flow of runoff traversing the yard from front to back, into an established drainage area.**

**While none of the above factors, in and of themselves, may be sufficient to justify a finding that the subject property is unique, when viewed in combination they do support this conclusion. Nevertheless, a mere finding of uniqueness, does not justify the granting of a variance unless all other required criteria are met.**

**As previously stated, in addition to finding that the property is unique, there must also be a finding that this uniqueness causes the zoning ordinance to impact more severely on the subject property than on other similarly situated properties. This disproportionate impact must create either practical difficulty, or unreasonable hardship for the Applicants. The Hearing Examiner must also decide whether the requested relief exceeds the minimum adjustment necessary to relieve any hardship imposed by literal enforcement of the zoning ordinance. If all of the aforesaid questions are answered in the affirmative, the Hearing Examiner must then determine whether the requested variance will be substantially detrimental to adjoining properties, the intent of the Code, or the public interest.**

**Both the Applicant, and the Co-Applicant, testified that if the subject variance is denied, they will be unable to construct the requested pool on their property, because their Homeowner's Association does not allow pools to be located in front or side yards. They allege that this will create an unreasonable hardship, for their family because there are other homes within the Vineyard Oaks Subdivision with in-ground pools.**

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**The Applicants could identify only one specific property within the their forested community for which the homeowners had received a variance to construct a pool within the Forest Retention Area. The property in that case (Case No. 5321) is located on an adjacent court, approximately 500 feet from Applicants property. The Applicants attempted to draw a corollary between their property and the property in the aforesaid case, by testifying that both parcels were constantly wet.**

**Mr. McClune however, indicated that he was not only present at that hearing, but also that he had testified in connection with that case. According to both Mr. McClune, and the Zoning Hearing Examiner's Decision, the testimony in Case No. 5321 clearly established that the rear yard of that parcel was a year round sump, and that the Applicants were denied any use whatsoever of their backyard. There was also specific evidence presented in that case to prove that the severe drainage problem on that lot was actually killing trees in the subject Forest Retention Area, and threatening trees in adjacent Forest Retention Areas.**

**There was no evidence introduced in this case to prove that wet conditions in the subject area of the Applicants' rear yard make the property unuseable, or that trees could not be grown in that portion of their rear yard. Therefore, the only real hardship alleged by the Applicants is that they will not be able to construct a 20-foot by 42-foot pool in their rear yard if the requested variance is not granted.**

**The Applicants knew of only one homeowner, other than the one referred to in Case No. 5321, who was a variance to construct a pool in a rear yard within the Vineyard Oaks Subdivision. They did not, however, testify that the one other pool was actually constructed within a Forest Retention Area. Furthermore, they identified only one other lot on Goosecross Court with an in-ground swimming pool. That pool, which is located on Lot 81, was constructed in close proximity to the dwelling, and does not encroach into the Forest Retention Area.**

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**The inability to construct a 20-foot by 42-foot pool within the Forest Retention Area of their yard admittedly presents a hardship from the Applicants' point of view. However, it is important to note that they are not requesting to construct a small pool in close proximity to their home. Nor are they proposing to construct a pool as far as physically possible outside of the confines of the Forest Retention Area. Rather, they are requesting to build a large pool in the far rear corner of their yard, which will be located totally within an environmentally protected space.**

**There was no testimony introduced to prove that the Applicants would not have been able to construct a smaller pool elsewhere on their property. In fact, according to Mr. Murphy they never even considered the possibility of building a smaller pool. In addition, there was no testimony introduced to show that the Applicants could not reduce the size of other improvements on the property, to allow for construction of the requested pool. Instead, the testimony established only that the subject location was the only place available on their lot for the construction of the requested large scale in-ground swimming pool.**

**The Hearing Examiner finds that there was no testimony introduced by the Applicants to prove that the requested variance does not exceed the minimum relief necessary to alleviate any perceived practical difficulty or unreasonable hardship in this case. The Applicants alleged that their rear yard is limited in size by virtue of the fact that they were required to build an attached rear deck to provide ingress and egress to their rear yard from the upper levels of their home. They failed however, to explain why they were required to build a multi level, 16-foot by 32-foot deck in order to accomplish this purpose. In addition to a large deck, the Applicants have also constructed a reasonably sized patio in their rear yard. This patio, as depicted in Applicant's Exhibit 7B, further limits their available rear yard space.**

**The Applicants chose, for whatever reason, to purchase one of the smaller lots within a forested community, in a location where 50% of their rear yard is encumbered by Forest Retention Area. They also chose to construct a large multi level deck, and a patio in their rear yard. The size of the deck, and the presence of the patio, have limited the space available for the installation of additional accessory uses. They cannot, therefore, be heard to complain that the presence of these other improvements creates a hardship, by preventing them from also constructing a large pool. Simply put, they did not purchase a lot large enough to accommodate multiple, large scale accessory uses.**

**The Applicants also failed to meet their burden of proving that the requested variance would cause no adverse impact to adjoining properties. The only statement made directly by either Mr. or Mr. Murphy addressing this particular issue was Mr. Murphy's allegation that there would be no detrimental impact because there are other pools in the neighborhood, and they propose to construct a "first class pool." Mr. Schneider also testified that the proposed pool would not cause any adverse environmental impact to adjacent properties. However, the only facts stated in support of this testimony were the lack of adverse impact on water quality, and the fact that the proposed pool would be screened from the view of adjacent property owners by existing trees.**

**It is undisputed that there is an existing drainage problem at the subject site. This problem results in the accumulation of water within the Forest Retention area between Applicants' rear yard and adjoining Lot No. 95. The Hearing Examiner rejects Mr. Nimmo's testimony that the requested pool would act as a reservoir, rather than an impervious surface. He offered no evidence, and expressed no basis in support of that statement. The Hearing Examiner accepts Mr. McClune's testimony that the pool would constitute an impervious surface during the winter months when it would be closed, and presumably covered.**

**The Hearing Examiner finds that the subject location was designed to function as a drainage easement by enabling water to collect there, and then either filtrate back into the ground, or flow out of the area. The construction of a large in-ground swimming pool in this particular portion of the Forest Retention Area would increase existing runoff, thereby creating additional drainage problems. In addition, the Applicants failed to address Ms. Van de Walls' concerns that digging a large hole, in close proximity to young trees recently planted in her adjoining Forest Retention Area, would damage the root systems of those trees.**

**For the reasons set forth above, the Hearing Examiner recommends denial of the subject application.**

**Date January 21, 2004**

**Rebecca A. Bryant**
**Zoning Hearing Examiner**